

L. R. CHURCH

IBLA 99-267

Decided October 10, 2001

Appeal from a decision of the Arizona State Office, Bureau of Land Management, declaring the Rex #1 through #6 mining claims forfeited. AMC 241375 through AMC 241380.

Reversed.

1. Mining Claims: Abandonment--Mining Claims: Rental or Claim Maintenance Fees:  
Generally--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

The purpose of the "postmark" rule for determining whether a document received within the regulatory grace period was mailed prior to the statutory deadline for filing, and thus was timely filed, is to make it unnecessary to resolve disputes regarding when a document was mailed. When the envelope in which such a document was received has been lost by BLM, the record is insufficient to support a finding that the document was not timely filed and a decision declaring the mining claim forfeited and void will be reversed.

APPEARANCES: Lynn C. Rodgers, Esq., Springfield, Missouri, for appellant; Richard R. Greenfield, Esq., Office of the Field Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

L. R. Church has appealed a February 25, 1999, decision by the Arizona State Office, Bureau of Land Management (BLM), declaring the Rex #1 through #6 mining claims (AMC 241375 through AMC 241380) forfeited for failure to pay a claim maintenance fee of \$100 per claim on or before August 31, 1998, or obtain a waiver, as required by the Omnibus Budget Reconciliation Act of 1993. 107 Stat. 405-06 (1993), codified at 30 U.S.C. § 28f (1994). <sup>1/</sup> The decision states that the waiver certificate BLM received from Church was enclosed in an envelope postmarked September 2, 1998.

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<sup>1/</sup> This statute has been subsequently amended to provide that the annual maintenance fee shall be paid on or before September 1 for each year from 1999 through 2001. Omnibus Consolidated Appropriations Act of October 21, 1998, P.L. 105-277, 112 Stat. 2681-235, codified at 30 U.S.C. § 28f(a) (Supp. IV 1998).

Appellant's statement of reasons for appeal (SOR) and supporting affidavit state that on August 24, 1998, he prepared an affidavit of assessment work and recorded it with the Mohave County, Arizona recorder the same day. (SOR at 1; Church Affidavit at ¶ 3). Appellant explains that, after performing additional assessment work, he returned to his home in Springfield, Missouri on August 30th. He recalls that "the file-stamped Affidavit had already arrived and was awaiting me upon my return to Springfield." (Church Affidavit at ¶ 4). Appellant further states:

It is my belief that I executed the Small Miners Maintenance Fee Waiver and put it in an envelope, together with the Affidavit of Performance of Annual Work, addressed to the BLM in Phoenix, Arizona, and affixed postage on same. It is my memory and belief that I deposited the envelope, properly addressed and postage prepaid, into a United States Postal Service mail box located in front of the Glenstone Branch of the United States Post Office, located in the Glenisle Shopping Center in Springfield, Missouri, prior to the time of the last pickup on August 31, 1998.

Id. at ¶ 5. Appellant points out that the affidavits are date-stamped as received by BLM on September 4, 1998, and argues that it is "unlikely, in the extreme, that a letter mailed from Springfield, Missouri, on September 2, 1998, would arrive in Phoenix, Arizona, on or before September 4, 1998." (SOR at 2). He notes that his notice of appeal, also mailed from Missouri, was not received by BLM until eight days later. Id. He contends that, since he has not been provided a copy of the envelope postmarked September 2nd, "the physical fact that it would take more than two (2) days to transmit a letter from Springfield, Missouri, to Phoenix, Arizona," supports a conclusion that the letter was "mailed in a timely fashion" and BLM's decision should be reversed. Id. Appellant further argues that he substantially complied with the law and the United States was not prejudiced because his waiver certificate was received within the fifteen days allowed for receipt of mail. Id. at 2-3; see 43 CFR 3833.0-5(m). He also contends that BLM was on notice of the waiver as of August 24, 1998, because the affidavit filed with Mohave County states that assessment work was being performed in lieu of payment of rental fees. Id. at 3-4.

In answer, BLM states that the issue on appeal is whether appellant timely filed his maintenance fee waiver. (Answer at 7). In support of the decision, BLM has provided an affidavit by a land law examiner in the Arizona State Office in which she states that she "personally reviewed the file prior to drafting of the decision and noted that the mailing envelope was clearly postmarked on September 2, 1998." (BLM Affidavit at ¶ 6). The land law examiner also states:

While I personally saw the incoming envelope \* \* \* and assert without reservation that the envelope was postmarked September 2, 1998, the incoming envelope is not currently in BLM's file. After a thorough search of BLM's records, it appears to have been lost or misplaced in the file or copying

rooms of the Arizona State Office, BLM, at some point in the process of preparing the case file for transmittal to the Board following the filing of Mr. Church's appeal of the February 25, 1999 decision.

(BLM Affidavit at ¶ 7). Hence, BLM argues that appellant's waiver certification was not timely filed as defined at 43 CFR 3833.0-5(m). (Answer at 9-10). In addition to responding to a number of statements in appellant's SOR, BLM raises an additional argument that the maintenance fee waiver certification form should not be deemed to have been timely filed because it was not signed. Id. at 14-16.

In reply to BLM's answer, appellant points out that BLM's affidavit acknowledges that BLM does not possess an envelope bearing a postmark after August 31, 1993, and argues: "Therefore, there is no substantial or competent evidence that the maintenance fee form was not mailed in a timely fashion." (Reply at 2). He contends that the two affidavits "essentially cancel one another out" and the Board must "rely on secondary evidence to determine the true facts in this case \* \* \*." Id. As such evidence, he again points out that his notice of appeal took eight days to reach BLM and adds that BLM's request for an extension of time took five days for delivery in Springfield, Missouri. Id. Appellant also argues that "[o]ut of all the thousands of envelopes and postmarks that [the BLM adjudicator] certainly must see each year, it is difficult to believe that she can really remember the actual date on any one of them." Id. at 3. Responding to BLM's argument concerning the lack of a signature on the maintenance fee waiver certification form, appellant contends that the defect is not fatal because the Omnibus Budget Reconciliation Act does not by its terms require execution by signature of the BLM waiver form itself and that submission of the properly identified form constitutes a certification of the facts shown therein. Id. at 3-4.

In response, BLM has disputed a number of statements made in appellant's reply. In particular, BLM notes that the BLM affidavit is itself evidence and provides substantial and credible evidence that the waiver form was not mailed until September 2, 1998. (BLM Response at 3-4). Further, BLM points out that the adjudicator refers to a March 2, 1999, memorandum in the case file describing "a telephone conversation [which she had on] that date [in which] Mr. Church appeared to acknowledge to me that he did not submit his maintenance fee waiver in a timely fashion for personal reasons." (BLM Affidavit at ¶ 9). The BLM response challenges appellant's affidavit as qualified in stating that to his "memory and belief" he mailed the form on August 31, 1998, and also defends the BLM adjudicator's credibility by arguing there is "no logical reason" she would have prepared the decision "unless the postmark was not timely." (BLM Response at 5).

The fundamental issue presented by this appeal is whether the BLM decision rejecting appellant's maintenance fee waiver certification form as untimely filed is properly affirmed on the record before us. The relevant statute required that a claim maintenance fee of \$100 be paid "on or before August 31 of each year" through August 31, 1998, but also provided

that the fee could be "waived for a claimant who certifies in writing to the Secretary that on the date the payment was due, the claimant and all related parties" did not hold more than 10 mining claims, mill sites, or tunnel sites, or combination thereof and had performed the assessment work required by the Mining Law of 1872. 30 U.S.C. § 28f(d) (1994) (Emphasis supplied.) The issue of whether the form was timely filed is critical because the Act specifies that:

Failure to pay the claim maintenance fee or the location fee as required by this subtitle shall conclusively constitute a forfeiture of the unpatented mining claim, mill or tunnel site by the claimant and the claim shall be deemed null and void by operation of law.

30 U.S.C. § 28i (1994). In the absence of payment of the claim maintenance fee, the failure to timely file a maintenance fee waiver form also results in forfeiture of the claim. Howard J. Hunt, 147 IBLA 381, 384 (1999); Alamo Ranch Co., 135 IBLA 61, 76 (1996).

By regulation, the Department has defined "filed" to mean "being received and date stamped by the proper BLM office" and has further provided that specified documents for mining claims are:

timely if received within the time period prescribed by law, or, if mailed to the proper BLM office, is contained within an envelope clearly postmarked by a bona fide mail delivery service within the period prescribed by law and received by the proper BLM State Office by 15 calendar days subsequent to such period \* \* \*.

43 CFR 3833.0-5(m). Because appellant's waiver certificate form was not received on or before August 31, 1998, the question is whether, when it was received by BLM on September 4, 1998, it was "contained within an envelope clearly postmarked by a bona fide mail delivery service within the period prescribed by law."

[1] That question should be simple to answer. The envelope, however, is not in the case file because, as BLM's affidavit acknowledges, "it appears to have been lost or misplaced in the file or copying rooms of the Arizona State Office." (BLM Affidavit at ¶ 7.) The parties contend that in such a circumstance the Board must look to secondary evidence to determine the postmark date. They also question the reliability of the affidavits each has provided as secondary evidence. They invite the Board to speculate about various scenarios which may have occurred. Such arguments fail to acknowledge the reasons for the postmark rule. "One purpose of the 'postmark' rule is to make it unnecessary to consider disputes concerning when a document may have actually been mailed." Clifford T. Fredrickson, 144 IBLA 105, 108 (1998). As we held in Fredrickson, the Board will apply the rule and decline to consider an assertion that a document was in fact mailed at an earlier date than indicated by the postmark on the envelope. See Clifford T. Fredrickson, supra at 108; Michael J. Whittle, 142 IBLA 61, 62 (1997).

On the other hand, when a mining claim maintenance fee waiver certification is received by mail within the grace period provided by regulation and the envelope in which a document was received has not been retained by BLM, the administrative record is insufficient to support a decision rejecting the waiver certification on the ground that it was not timely filed. This does not involve a finding that the BLM adjudicator misrepresented the facts, but rather a finding that the evidentiary standard (postmark) has been set by regulation and that a decision rejecting the filing cannot be sustained when BLM has lost that record.

In deciding this case we are guided by the precedent set forth in Gary Hennis, 108 IBLA 121, 123 (1989). In the Hennis case we noted "BLM at one point had an envelope, which may or may not have displayed a 'clearly dated postmark affixed by the United States Postal Service within the period prescribed by law,' but that envelope is no longer part of the record." In deciding Hennis, the Board observed that it had previously imposed a duty on BLM to retain envelopes containing payments of rent on oil and gas leases because "the action of the State Office in destroying the envelope that prevents reference to the critical postmark date \* \* \* should not work to the detriment of the lessee." Id. at 123-24, quoting R. G. Price, 8 IBLA 290, 292-93 (1972). The Board went on to state:

The rationale adopted by the Board in the Price case has even greater applicability in the present case because the Department, in promulgating 43 CFR 3833.0-5(m), intended to provide mining claimants some relief from the filing deadline, and in so doing, implicitly required BLM to keep the envelopes in which filings were made. Thus, appellant should not be responsible for bearing the consequences of BLM's failure to retain the envelope. Since the envelope containing appellant's proof of labor apparently was destroyed or discarded by BLM, it would be patently unfair to allow BLM to utilize that fact in support of its position that appellant's \* \* \* filing was untimely.

Id. at 124; see Zonal Corp., 145 IBLA 227, 230 (1998). Thus we reverse the BLM decision declaring the claims forfeited for failure to timely file the waiver certification.

On appeal, BLM urges the Board to exercise its de novo review authority to affirm the BLM decision on the alternative ground that the maintenance fee waiver certification form (Form 3830-2) filed by appellant was unsigned. The relevant regulation provided that a small miner shall file a waiver certification by August 31 of each year for the assessment year commencing on September 1 of the year in which the certification is due. 43 CFR 3833.1-7(d). The waiver certification shall identify the claims held by claimant, contain a statement that claimant and all related parties own no more than 10 claims on the date the waiver statement is due, contain a declaration that the assessment work requirements have been or will be completed by the time the waiver statement is due, and contain the signature of the claim owners. Id. Further, the regulation at 43 CFR 3833.1-7(d) requires that "[t]he small miner shall document, as provided in this paragraph (d), the claimed waiver for each assessment year a

small miner's waiver is claimed, certified, and attested to under penalty of 18 U.S.C. 1001.” <sup>2/</sup>

It appears from the record that the waiver certification form (Form 3830-2) was timely filed for the assessment year beginning on September 1, 1998 (the first September 1 following the official filing with BLM). The form was filled in by the appellant, identifying the claims by name and BLM recordation serial number and identifying L. R. Church as the owner of the claims. Further, the form states that appellant controls 10 or fewer mining claims as of August 31, 1998, and that he has or will have performed assessment work for the current assessment year by that date. Although appellant filled out and timely filed the waiver certification on Form 3830-2, he failed to provide his signature (as owner) on the form as directed by 43 CFR 3833.1-7(d)(5). <sup>3/</sup> The failure to provide all information required by the regulations at 43 CFR 3833.1-7(d) is a curable defect when the document is otherwise filed timely and the claim shall not be conclusively deemed forfeited in the absence of notice providing 30 days to supply the information. See 43 CFR 3833.4(b); Samual B. Fretwell, 154 IBLA 201, 205 (2001). Thus the claims are not properly deemed forfeited and void in the absence of notice and an opportunity to provide the signature omitted on Form 3830-2. We think this case is properly distinguished from one in which no contemporaneous certification of compliance with the regulatory requirements for a waiver as of the date payment was due was timely filed with BLM by August 31 of the year in which payment was otherwise due. See Thomas L. Carufel, 155 IBLA 340 (2001).

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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Lisa Hemmer  
Administrative Judge

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<sup>2/</sup> The statute referred to is a criminal statute making it a crime to make a material misrepresentation of fact in providing information to the Government.

<sup>3/</sup> The waiver certification form filed with BLM was accompanied by an “Affidavit of Performance of Annual Work” in which appellant certified both to his qualifications for a waiver and his performance of annual assessment work. The affidavit, signed by appellant and acknowledged before a notary on August 24, 1998, contains virtually all of the information required by regulation in the waiver certification.